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No. 04-885

Supreme Court, U.S.
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In The
Supreme Court of the United States

CENTRAL VIRGINIA COMMUNITY COLLEGE,
VIRGINIA MILITARY INSTITUTE,
NEW RIVER COMMUNITY COLLEGE, and
BLUE RIDGE COMMUNITY COLLEGE,

Petitioners,

v.

BERNARD KATZ, Liquidating Supervisor of the
Bankrupt Estate of *In re Wallace's Bookstores, Inc.*,
No. 01-50545 (Bkr. E.D. Ky.),

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE THREE COMMUNITY COLLEGES HAVE NOT WAIVED SOVEREIGN IMMUNITY 2

A. Because a Waiver of Sovereign Immunity May Not Be Extrapolated From One State Agency to Another State Agency, There Is No Waiver by the Three Community Colleges..... 3

B. Because the Waiver Is Limited to the Amount of the Proof of Claim, the Waiver Is Inapplicable to Most of the Claims..... 6

II. THE CONFLICT AMONG THE CIRCUITS HAS WIDENED..... 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Arecibo Community Health v. Puerto Rico,
270 F.3d 17 (1st Cir. 2001) 4

Bezner v. East Jersey State Prison (In re Exact Temp., Inc.),
231 B.R. 566 (Bkr. D. N.J. 1999) 5

College Savings Bank v. Florida Prepaid Post-secondary Ed. Expense Bd.,
527 U.S. 666 (1999) 4, 7

Department of the Army v. Blue Fox, Inc.,
525 U.S. 255 (1999) 4

Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.,
450 U.S. 147 (1981) (*per curiam*) 4

Gardner v. New Jersey,
329 U.S. 565 (1947) 7

Georgia Higher Education Assistance Corp. v. Crow (In re Crow),
394 F.3d 918 (11th Cir. 2004) 8, 10

Hood v. Tennessee Student Assistance Corp. (In re Hood),
319 F.3d 755 (6th Cir. 2003) (*Hood I*) 1, 3

Jones v. Yorke (In re Friendship Medical Center, Ltd.),
710 F.2d 1297 (7th Cir. 1983) 4, 7

Kennecott Copper Corp. v. State Tax Comm'n,
327 U.S. 573 (1946) 4

Ohio v. Madeline Marie Nursing Homes Nos. 1 & 2,
694 F.2d 449 (6th Cir. 1982) 4, 5, 7

TABLE OF AUTHORITIES – Continued

Page

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe,
498 U.S. 505 (1991) 6, 7

Ossen v. Department of Social Services (In re Charter Oak Associates),
361 F.3d 760 (2nd Cir.), *cert. denied*,
125 S. Ct. 408 (2004) 4, 5

Sacred Heart Hosp. v. Department of Public Welfare (In re Sacred Heart Hosp. of Norristown),
204 B.R. 132 (E.D. Pa. 1997) 5

Schlossberg v. Maryland (In re Creative Goldsmiths),
119 F.3d 1140 (4th Cir. 1997) 4, 5

Schulmann v. California (In re Lazar),
237 F.3d 967 (9th Cir. 2001) 4

Seminole Tribe v. Florida,
517 U.S. 44 (1996) 9

Sims v. Apfel,
530 U.S. 103 (2000) 3

Smith v. Reeves,
178 U.S. 436 (1900) 4

Tennessee Student Assistance Corp v. Hood,
124 S. Ct. 1905 (2004) (*Hood II*) 1

Unicare Homes, Inc. v. Four Seasons Care Centers, Inc. (In re Four Seasons Care Centers, Inc.),
119 B.R. 681 (Bkr. D. Minn. 1990) 5

United States v. King,
395 U.S. 1 (1969) 4

United States v. Shaw,
309 U.S. 495 (1940) 6, 7

TABLE OF AUTHORITIES – Continued

Page

United States v. United States Fidelity & Guaranty Co., 309 U.S. 506 (1940) 6

William Ross, Inc. v. Biehn Construction, Inc. (In re Ross), 199 B.R. 551 (Bkr. W.D. Pa. 1996) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 4 ..... *passim*

STATUTES

Bankruptcy Act, ch. 575, 52 Stat. 883 (1938) (repealed in 1978 by P.L. 95-598, current version at 11 U.S.C. §§ 101-1330) 7

11 U.S.C. § 106(b) 7

11 U.S.C. § 106(c) 7

OTHER AUTHORITIES

Brief of Ohio and Forty-Eight Other States, *Central Virginia Community College v. Katz* (March 2, 2005) (04-885) 1

Brief of Virginia and Twelve States, *Schaeffer v. Weast* (Jan. 21, 2005) (04-698) 1

Brief of Idaho and Forty-Nine Other States, *Elk Grove Unified Sch. Dist. v. Newdow*, (June 10, 2003) (02-1624) 1

REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

Central Virginia Community College, Virginia Military Institute, New River Community College, and Blue Ridge Community College (collectively, "the Virginia Institutions"), by and through their counsel, Virginia Attorney General Judith Williams Jagdmann, submit this Reply Brief in support of their Petition for a Writ of Certiorari.

Nothing in the *Brief in Opposition* calls into question the need for this Court to grant certiorari and resolve the issue of whether Congress may use the Article I Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4, to abrogate sovereign immunity. Indeed, the Respondent, Bernard Katz, does not seriously contest that: (1) the Circuits are divided on the question presented; (2) the question presented has enormous consequences for the States;[1] and (3) unlike *Tennessee Student Assistance Corp v. Hood*, 124 S. Ct. 1905 (2004) (*Hood II*), this matter cannot be resolved on the basis of *in rem* jurisdiction.

Rather, Katz opposes certiorari by: (1) asserting that sovereign immunity has been waived for all Virginia Institutions; (2) urging this Court to delay resolution of the conflict among the Circuits; and (3) contending that the Sixth Circuit's decisions in this matter and in *Hood v. Tennessee Student Assistance Corp.* (*In re Hood*), 319 F.3d 755 (6th Cir. 2003) (*Hood I*) are correct.

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[1] Indeed, *every other* State in the Union has joined an amicus brief urging this Court to grant review. *See* Brief of Ohio and Forty-Eight Other States, *Central Virginia Community College v. Katz* (March 2, 2005) (04-885). Although the States routinely file amicus briefs urging this Court to grant certiorari, *see generally* Brief of Virginia and Twelve States, *Schaeffer v. Weast* (Jan. 21, 2005) (04-698), it is *rare* for *all* of the States to support certiorari. Indeed, in recent years, it appears that only one other issue – the constitutionality of the Pledge of Allegiance – has garnered the unanimous support of all fifty States. *See generally*, Brief of Idaho and Forty-Nine Other States, *Elk Grove Unified Sch. Dist. v. Newdow*, (June 10, 2003) (02-1624).

In Reply, the Virginia Institutions make two points. First, regardless of whether Virginia Military Institute ("VMI") has waived sovereign immunity, the other three Petitioners – Central Virginia Community College, New River Community College, and Blue Ridge Community College (collectively the "Community Colleges") – have not waived sovereign immunity. Second, since the Petition was finalized, the conflict among the Circuits has widened.

I. THE THREE COMMUNITY COLLEGES HAVE NOT WAIVED SOVEREIGN IMMUNITY.

As explained in the Petition, there is some question as to whether *one* of the Petitioners – VMI – waived sovereign immunity. *See Pet.* at 6 n.9. A VMI employee, who had no authority to waive sovereign immunity, filed a proof of claim on behalf of VMI. However, no proof of claim was filed for the other *three* Petitioners – the Community Colleges. Because these *three* Community Colleges did not file proofs of claim, there should be no argument that sovereign immunity was waived for *all* Petitioners.

Nevertheless, Katz argues that the filing of a proof of claim on behalf of VMI "operated as a waiver of Virginia's sovereign immunity, thereby constituting a waiver on behalf of Virginia's other state agencies." *Resp'ts Br. in Opp'n* at 4. In other words, Katz asserts that if *one* state agency waives sovereign immunity, *all* state agencies waive sovereign immunity. The waiver of one agency is extrapolated to the other agency.

Moreover, although the VMI proof of claim was for $43,247.60, Katz claims that sovereign immunity is waived for claims totaling $408,233.79. Of this total, only $108,063.00 concerns VMI. The remaining $300,170.79 involves the three Community Colleges. In other words, Katz contends that the waiver has been expanded well beyond the proof of claim.

Quite simply, Katz' waiver argument does not preclude the granting of certiorari.[2] First, because a waiver of sovereign immunity may not be extrapolated from one state agency to another state agency, there is no waiver. To say otherwise is to ignore this Court's principles for construing waivers of sovereign immunity and the weight of lower court authority on the scope of waivers that result from the filing of a proof of claim. Second, because the waiver is limited to the amount of the proof of claim, the waiver is inapplicable to most of the claims. To say otherwise is to ignore this Court's jurisprudence on waivers that result from the sovereign's initiation of suit.

A. Because a Waiver of Sovereign Immunity May Not Be Extrapolated From One State Agency to Another State Agency, There Is No Waiver by the Three Community Colleges.

Even if VMI has waived sovereign immunity, that waiver cannot be extrapolated to other state agencies and institutions. This is so for two reasons.

First, Katz' extrapolation of waiver theory is contrary to this Court's principles for construing waivers of sovereign immunity. "[A] waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the

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[2] Furthermore, Katz never raised this argument in the court of appeals, in the district court on the bankruptcy appeal, or in the bankruptcy court. Although Katz consistently argued that VMI had waived sovereign immunity, *see App.* at 7-8 (Bankruptcy court holds that VMI had waived sovereign immunity); *App.* at 4 (District court declines to address whether VMI has waived), he never suggested that VMI's purported waiver applied to the Community Colleges. Generally, this Court will not consider contentions that were neither pressed nor passed upon in the lower courts. *See Sims v. Apfel*, 530 U.S. 103, 108-09 (2000). Thus, having failed to raise the issue of waiver for the Community Colleges in the lower courts, Katz may not raise the issue now. *See Hood I*, 319 F.3d at 760-61 (refusing to consider a waiver argument that had not been made in the bankruptcy court or before the bankruptcy appellate panel).

sovereign." *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999). Indeed, waivers of sovereign immunity may not be implied. *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 682 (1999) *See also United States v. King*, 395 U.S. 1, 4 (1969) (describing the "settled propositio[n]" that the United States' waiver of sovereign immunity "cannot be implied but must be unequivocally expressed.") Thus, a State does not consent to suit in federal court by merely consenting to suit in the courts of its own creation. *Smith v. Reeves*, 178 U.S. 436, 441-45 (1900). Nor does it consent to suit in federal court by merely stating its intention to "sue and be sued," *Florida Dept. of Health and Rehabilitative Servs. v. Florida Nursing Home Assn.*, 450 U.S. 147, 149-50 (1981) (*per curiam*), or even by authorizing suits against it "in any court of competent jurisdiction." *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 577-79 (1946). In light of these principles, a waiver of sovereign immunity on behalf of one agency for particular claims cannot be extrapolated to a *different* agency for *different* claims. The proof of claim filed on behalf of VMI was limited to VMI and a specific transaction. Any waiver that resulted from that action cannot be applied to a different institution – the three Community Colleges. Nor can it be applied to a different transaction – the Community Colleges' business dealings with the bankrupt entity.

Second, Katz' extrapolation of waiver theory is contrary to the weight of lower court authority on the scope of waivers that result from the filing of a proof of claim in bankruptcy. When a state agency files a proof of claim in bankruptcy, any resulting waiver is limited to claims that arise out of the same transaction or occurrence. *See Arecibo Community Health v. Puerto Rico*, 270 F.3d 17, 28 (1st Cir. 2001); *Schulmann v. California* (*In re Lazar*), 237 F.3d 967, 978 (9th Cir. 2001); *Schlossberg v. Maryland* (*In re Creative Goldsmiths*), 119 F.3d 1140, 1149 (4th Cir. 1997); *Jones v. Yorke* (*In re Friendship Medical Center, Ltd.*), 710 F.2d 1297, 1301 (7th Cir. 1983); *Ohio v. Madeline Marie Nursing Homes Nos. 1 & 2*, 694 F.2d 449, 462 (6th Cir. 1982). *But see Ossen v. Department of Social*

Services (*In re Charter Oak Associates*), 361 F.3d 760, 768-72 (2nd Cir.), *cert. denied*, 125 S. Ct. 408 (2004). In other words, the waiver of sovereign immunity does not extend to claims involving *different* transactions. *See Schlossberg*, 119 F.3d at 1149; *Jones*, 710 F.2d at 1301; *Madeline Marie*, 694 F.2d at 462. *But see Ossen*, 361 F.3d at 768-69. Nor does one state agency's waiver of sovereign immunity extend to claims involving *different* agencies. *See Sacred Heart Hosp. v. Department of Public Welfare* (*In re Sacred Heart Hosp. of Norristown*), 204 B.R. 132, 142 (E.D. Pa. 1997); *William Ross, Inc. v. Biehn Construction, Inc.* (*In re Ross*), 199 B.R. 551, 556 (Bkr. W.D. Pa. 1996); *Bezner v. East Jersey State Prison* (*In re Exact Temp., Inc.*), 231 B.R. 566, 571 (Bkr. D. N.J. 1999); *Unicare Homes, Inc. v. Four Seasons Care Centers, Inc.* (*In re Four Seasons Care Centers, Inc.*), 119 B.R. 681, 683-84 (Bkr. D. Minn. 1990) (All holding that filing of a proof of claim by one state agency does not waive the sovereign immunity of another state agency). *But see Ossen*, 361 F.3d at 772 (Holding that, at least where state agencies act as a unitary creditor, the filing of a proof of claim by one agency waives the sovereign immunity of the other agencies).

In the present matter, it is undisputed that the transaction or occurrence involving the claims against VMI is separate and distinct from the transactions or occurrences involving the three Community Colleges. Indeed, Katz recognized this fact when he chose to file *separate* adversary proceedings against VMI and each of the three Community Colleges. *See Resp'ts Br. in Opp'n* at 1 (discussing multiple proceedings and multiple complaints). *See also App.* at 5 (denying sovereign immunity to Central Virginia Community College), 7 (denying sovereign immunity to Virginia Military Institute), 9 (denying sovereign immunity to New River Community College), and 11 (denying sovereign immunity to Blue Ridge Community College).[3] Because the claims against the Community College arise

[3] The four complaints were consolidated during the bankruptcy appellate proceedings in the district court.

out of separate transactions and occurrences, VMI's purported waiver of sovereign immunity does not extend to the Community Colleges.

In sum, VMI's purported waiver of sovereign immunity is inapplicable to the Community Colleges. To say otherwise is to ignore this Court's principles for construing waivers of sovereign immunity and the weight of lower court authority on the scope of waivers that result from the filing of a proof of claim. Thus, regardless of whether VMI waived sovereign immunity, it is clear that the three Community Colleges have not. Consequently, there is no waiver to prevent this Court from resolving the question of whether Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity. Certiorari should be granted.

B. Because the Waiver Is Limited to the Amount of the Proof of Claim, the Waiver Is Inapplicable to Most of the Claims.

Even if VMI has waived sovereign immunity and even if that waiver can be extrapolated to the three Community Colleges, the waiver is inapplicable to claims that *exceed the amount of the proof of claim*. Because Katz' claims against the Virginia Institutions far exceed the amount of the proof of claim, the waiver is inapplicable to the vast majority of Katz' claims.

Under this Court's well-established constitutional jurisprudence, any waiver of sovereign immunity from the invocation of federal jurisdiction is limited to allowing a remedial order to the other party that does not exceed in amount or differ in kind from that sought by the sovereign. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 509 (1991); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 511-12 (1940); *United States v. Shaw*, 309 U.S. 495, 501-02 (1940). Thus, where the sovereign initiates a suit for injunctive relief, a counter-claim or cross-claim for damages is barred. *Potawatomi Tribe*, 498 U.S. at 509; *United States Fidelity & Guaranty Co.*, 309 U.S. at 513. In other

words, the filing of a claim did not create a broad waiver, *see Potawatomi Tribe*, 498 U.S. at 509. Rather, the filing of a claim merely allows the adjudication of *that* claim. *See Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). Consequently, where a sovereign brings an action for damages, any counterclaim seeking an amount of damages greater than the amount originally sought by the sovereign, even with respect to a mandatory counter-claim, is barred by sovereign immunity. *Shaw*, 309 U.S. at 501. Therefore, if a state agency files a proof of claim in bankruptcy, any resulting waiver logically is limited to the amount of the proof of claim.

Indeed, two Circuits interpreting the Bankruptcy Act, the predecessor to the current Bankruptcy Code, held that a waiver resulting from a proof of claim was limited to the amount of the proof of claim.[4] *See Jones*, 710 F.2d at 1301; *Madeline Marie Nursing Homes*, 694 F.2d at 462. Although the enactment of § 106(c) of the current Bankruptcy Code purported to redefine and expand the scope of the waiver that results from the filing of a proof of a claim, this Court's decision in *College Savings Bank* casts serious doubt on the ability of Congress to redefine the scope of the waiver. *See College Savings Bank*, 527 U.S. at 685-87. However, regardless of whether § 106(c) is constitutional, most of Katz' claims are barred by sovereign immunity.

Quite simply, in bringing four separate cases against VMI and the three Community Colleges, Katz seeks amounts that are greater than the amount of the proof of claim. The proof of claim filed on behalf of VMI was for $43,237.60. However, Katz is seeking a total of $408,233.79 from the Virginia Institutions ($30,409.00 in

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[4] Section 106(c) allows for "setoff" up to the amount of the State's claim for unrelated counterclaims. While Section 106(b) purportedly allows for affirmative recovery for mandatory counterclaims, it is clear that the claims of the various Virginia Institutions, based on separate contracts, negotiated separately, with separate terms, and ordering separate items, at separate times, with separate payments, cannot possibly be viewed as all being part of the "same transaction or occurrence."

receivables and $77,654.00 in preferential transfers from VMI; $4,898.00 in receivables and $63,387.00 in preferential transfers from Central Virginia Community College; $97,249.61 in receivables and $65,264.00 in preferential transfers from New River Community College; $35,317.60 in receivables and $34,054.58 in preferential transfers from Blue Ridge Community College). While there may be a waiver for the first $43,237.60, there is no waiver of sovereign immunity for the remaining $364,996.19.[5] The only way for Katz to overcome sovereign immunity for the remaining $364,996.19 is if sovereign immunity has been abrogated.

In sum, even if VMI has waived sovereign immunity and even if that waiver extends to the three Community Colleges, the waiver is inapplicable to $364,996.19 of Katz' claims. Because the purported waiver is inapplicable to the vast majority of Katz' claims, the waiver does not constitute a barrier to this Court considering the abrogation issue. Certiorari should be granted.

II. THE CONFLICT AMONG THE CIRCUITS HAS WIDENED.

Since this Petition was finalized, the conflict among the Circuits has widened.[6] The Eleventh Circuit, in *Georgia Higher Education Assistance Corp. v. Crow* (*In re Crow*), 394 F.3d 918 (11th Cir. 2004), joined the Third, Fourth, Fifth, Seventh, and Ninth Circuits in holding that Congress many not use the Article I Bankruptcy Clause to abrogate sovereign immunity. *Crow*, 394 F.3d at 921-22.[7]

[5] Indeed, Katz' claims against VMI alone total $108,063.00. Thus, $64,825.40 of his claims against VMI is barred by sovereign immunity.

[6] Although this Petition was not filed until December 29, 2004, it was finalized with the outside printing company on the morning of December 23, 2004. The Eleventh Circuit rendered its decision on the afternoon of December 23.

[7] The Eleventh Circuit also rejected the notion that Congress' attempt to abrogate sovereign immunity was a valid exercise of Congress' power to enforce the Fourteenth Amendment. *See Id.* at 922-24.

Thus, *six* Circuits have found that sovereign immunity bars an adversary proceeding in bankruptcy and *one* Circuit – the court below – has found that sovereign immunity is no bar.

In concluding that sovereign immunity has not been abrogated, the Eleventh Circuit employed an analysis that is remarkably similar to that employed by the majority of the Circuits to address the issue. Not surprisingly, the Eleventh Circuit analysis is diametrically opposed to the analysis utilized by the court below. In explaining why the Article I Bankruptcy Clause could not be used to abrogate sovereign immunity, the Eleventh Circuit observed:

> in *Seminole Tribe* [*v. Florida*, 517 U.S. 44 (1996)] the Supreme Court held that Congress may not abrogate state sovereign immunity by legislation passed pursuant to its Article I powers.
>
> The Crows read *Seminole Tribe* narrowly, and would restrict the reach of the decision to the Article I powers that were involved in *Seminole Tribe* itself, which are the ones flowing from the Indian and Interstate Commerce Clauses. Under the Crows' theory those powers are positively less potent for present purposes than Congress' Bankruptcy Clause power, because those other powers do not stem from a source that contains a uniformity requirement as the Bankruptcy Clause does. That theory, however, runs counter to the Supreme Court's sharp statement in *Seminole Tribe* that "[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." The Court did not qualify its emphatic statement that Article I cannot be used to get around the Eleventh Amendment, and we decline to do so here, because the Supreme Court has reiterated in a number of cases since then that "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers."

Crow, 394 F.3d at 922 (citations omitted). Moreover, unlike the Third, Fourth, Fifth, Seventh, and Ninth Circuits, the Eleventh Circuit reached this decision fully aware of the Sixth Circuit's decisions in *Hood I* and this case. *See Crow,* 394 F.3d at 921 ("For reasons we will explain, today we join five of the six circuits that have considered the issue in holding that [the] purported abrogation of Eleventh Amendment immunity in bankruptcy proceedings, which is clear and specific, is nonetheless invalid in light of the Supreme Court's decision in *Seminole Tribe.*") (citation omitted). Yet, the Eleventh Circuit chose not to adopt the Sixth Circuit's flawed analysis.

The fact that the conflict among the Circuits has widened in recent weeks illustrates both the recurring nature of the issue and the need for this Court to provide definitive guidance. Resolution of the issue should not be postponed while the few Circuits that have not addressed the issue choose between the approach of six Circuits and the unique approach of the court below. Certiorari should be granted.

CONCLUSION

For the reasons stated in the Petition and above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

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